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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 133, UAW, AFL-CIO, *Petitioner,*

v.

THE FAFNIR BEARING COMPANY AND THE NATIONAL LABOR RELATIONS BOARD, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, UAW Local 133, prays that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Second Circuit denying petitioner leave to intervene in proceedings to review an order of the National Labor Relations Board.

Opinions Below

The Decision and Order of the National Labor Relations Board is reported at 146 NLRB No. 179. The opinion of the court below denying leave to petitioner to intervene, issued December 24, 1964, is not yet reported and appears *infra* in Appendix A, pp. 11 to 16.

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit denying the Union leave to intervene was entered on December 24, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

Question Presented

When the National Labor Relations Board upholds a union's unfair labor practice charge against an employer after proceedings in which the union participates as a party, may the union be denied intervention in judicial review proceedings brought by the employer wherein the union's statutory rights will be finally determined?

Statute Involved

29 U.S.C. § 160(f) provides in part:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides

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[1] Though we believe that statutory certiorari jurisdiction presently lies consistent with the "party to the case" proviso of 28 USC 1254(1), should the Court disagree, we respectfully request leave to have this petition filed as one under 28 USC 1651 for common-law certiorari.

or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . . The court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board".

Statement

On January 18, 1965, this Court granted certiorari in No. 650, *International Union* v. *Scofield*, to review the question whether a union which is the successful *defending party* before the Labor Board may be denied intervention in the judicial review proceeding brought by the charging party. Certiorari is sought in this case on the correlative question whether the union which is the successful *charging party* before the Board may be denied intervention in the judicial review proceeding brought by the defending party. The Court of Appeals below, although noting the existence of precedents both ways, announced that it joins with circuits denying intervention, "although the issue seems more debatable to us than it did to them" (p. 12, *infra*).

On February 11, 1963, petitioner (hereafter referred to as the Union) filed a charge with the National Labor Relations Board alleging that the Fafnir Bearing Company had violated Sections 8(a)(1) and 8(a)(5) of the Act when it refused to permit the Union to perform time studies on jobs involved in certain grievances arising under the collective bargaining agreement between the Union and the Company. Under Section 10(b) of the Act, the Union's

charge was the necessary jurisdictional predicate for the issuance of a complaint by the General Counsel of the NLRB, and such a complaint was in due course issued on May 7, 1963.

Pursuant to Section 102.8 of the Board's Rules and Regulations, the charging Union was a party to the subsequent Board proceedings, and participated throughout on a parity with the Company and the Board's General Counsel. On May 13, 1964 the Board issued its Decision and Order, finding that the Company violated the Union's rights protected by Sections 8(a)(1) and 8(a)(5) of the Act.

On October 9, 1964 the Company filed a petition to review the Decision and Order of the Board in the Court of Appeals for the Second Circuit. On November 30, 1964 the Union moved for leave to intervene in the judicial review proceeding. The Board, consistent with its general position, opposed the Union's intervention and an opinion of the court below denying said intervention was issued on December 24, 1964. See *infra*, Appendix A, p. 11. Certiorari is sought to resolve an important federal question closely related to the issue pending before this Court in *International Union* v. *Scofield*, No. 650.

REASON FOR GRANTING THE WRIT

This Case Presents a Recurrent and Important Intervention Issue Closely Related to the Issue Pending in No. 650, International Union v. Scofield.

1. *Related Issue Pending.* In No. 650, certiorari granted January 18, 1965, this Court is reviewing the question whether a *charged party* before the Labor Board may be denied intervention in the judicial review of the Board's decision; the question in the present case is whether the *charging party* before the Board may be denied intervention in the judicial review of the Board's decision. The

two cases cover equally important halves of the same intervention issue. This Court has frequently deemed appropriate its concurrent review of closely related questions, and has even on occasion effectuated that result on its own motion. See e.g., *Brown* v. *Board of Education*, 344 U.S. 1, 3; *Local Union No. 189* v. *Jewel Tea Co.*, 379 U.S. 813.

2. *Important Question Presented.* Without illuminating opinions or court rules, most circuit courts have denied intervention to the charging party in judicial review of a Board decision, but intervention has occasionally been allowed. See, e.g., *West Texas Utilities Company* v. *NLRB*, 184 F. 2d 233 (C.A.D.C. 1950); *Kearney & Trecker Corporation* v. *NLRB*, 210 F. 2d 852 (C.A. 7 1954); *Inland Steel Company* v. *NLRB*, 170 F. 2d 247 (C.A. 7 1948); *Donnelly Garment Company* v. *NLRB*, 151 F. 2d 854 (C.A. 8 1945); *Local 761, IUE* v. *NLRB*, 278 F. 2d 282 (C.A.D.C. 1960). The opinion below, the first analysis of this recurring subject in the federal appellate courts, follows decisions in other circuits denying intervention to the charging party, while stating that *"the issue seems more debatable to us than it did to them."* Certainly the question here is of no less importance to the orderly administration of justice in federal courts than is the question this Court has agreed to review in No. 650; indeed, applications by charging parties before the Board for Court of Appeals participation are even more frequent than those by respondents.

3. *Intervention Controlled by Fortuity.* Furthermore, like the ruling of the Seventh Circuit in No. 650, the ruling here permits sheer fortuity to control intervention in judicial review of Labor Board cases. Thus, if the Board *dismisses a complaint or any part of a complaint* against an employer, the charging union as a "person aggrieved" under Section 10(f) of the statute may bring judicial review proceedings in the Court of Appeals and participate fully therein, then on certiorari, and finally

before this Court. But if the Board grants the relief sought, the decision below relegates a charging union to the permissive rights of amicus—precluded from equal participation in the Court of Appeals and opportunity to seek certiorari from an adverse judgment.[2] Yet the interest of the charging party in the ultimate determination of its rights under the National Labor Relations Act is identical whether the judicial review be from a Board order granting or from one denying relief. To permit full judicial participation in one case but deny it in the other, is to make sheer fortuity the measure of intervention rights in judicial review of Labor Board orders.

4. *Congressional Intent Frustrated.* It also seems clear that *Congress intended parity of participation by the charging party from the beginning to the end of Labor Board litigation:*

> (i). In Section 10(b) Congress has made the charge by an injured party the jurisdictional prerequisite to the filing of the initial Labor Board complaint;
>
> (ii). Under the Board's construction of the Act, it has given the charging party automatic standing in Board proceedings on parity with the charged party in every respect. Rules and Regulations Sec. 102.8. See

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[2] The present case highlights the importance of this opportunity to seek certiorari. On the merits this case involves the question of the Union's access to time study information, which question the Company claims to have been definitively determined against the position of the Board and the Union by a ruling of the court below some years ago in *NLRB* v. *Otis Elevator Company*, 208 F. 2d 176. Should the court below agree with this view of its own precedent in *Otis Elevator* and apply *stare decisis, only* in this Court could the Union be accorded substantive review. Yet the Board might decline to seek this Court's review, with the net result that the Union which has from the very first participated in the adjudication of its federal right to time study information would be denied the opportunity of obtaining redress before the highest court of the land. Such an eleventh hour curtailment of the injured party's participation in the adjudication of its statutory rights is at odds with the congressional recognition of the essentially tripartite nature of Labor Board adjudication.

also *Marine Engineers' Ben. Ass'n* v. *NLRB*, 202 F. 2d 546 (C.A. 3, 1953), cert. denied, 346 U.S. 819;

(iii). The charging party is deemed a "person aggrieved" within the Congressional intent of Section 10(f), and thus entitled to invoke judicial review if the Board refuses any of the relief sought by the charging party. *Albrecht* v. *NLRB*, 181 F. 2d 652 (C.A. 7, 1950) and cases there cited;

(iv). In the Taft-Hartley Act, in adding the new injunction proviso of Section 10(l), Congress expressly provided that the Board's petition for relief in the District Court should be served "upon any person involved in the charge and such person, *including the charging party*, shall be given an opportunity to appear by counsel and present any relevant testimony" (emphasis supplied).

(v). It would hardly appear likely that Congress, which made the charging party's action necessary to commence the proceedings, fully protected the charging party's right to participate throughout the proceedings, and authorized it to initiate judicial review, intended to deny the significant intervention right here involved.

5. *The "Public Rights" Dogma.* In denying intervention the court below relies principally upon *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, which emphasized the "public rights" approach of the NLRA and rejected labor union standing to bring a judicial contempt proceeding upon an injunction originally obtained by the Board. But *Amalgamated Utility Workers* is clearly not controlling on the present issue. The present question is not whether the aggrieved charging party before the Board may bring a contempt proceeding, but whether he may intervene in existing judicial review and enforcement

proceedings brought by the Company and the Board. Cf. *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, 506-8.

Moreover, *Amalgamated* notwithstanding, this Court has recognized the existence of "private rights" under the NLRA, and the consequent standing of injured private parties to initiate and to participate in judicial review of Board action. See, e.g., *Leedom* v. *Kyne*, 358 U.S. 184, 190; *Office Employees* v. *NLRB*, 353 U.S. 313; *International Union* v. *Eagle-Picher Mining and Smelting Co.*, 325 U.S. 335, 338; *cf. Hirsch* v. *McCulloch*, 303 F. 2d 208 (C.A.D.C. 1962). A sharp division between "public rights" and "private rights" in labor relations has been rejected in recent decisions of this Court recognizing the direct interplay between unfair labor practice remedies and judicial or arbitral remedies under the collective bargaining agreement. See, e.g., *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268; *Smith* v. *Evening News Ass'n.*, 371 U.S. 195, 197. Indeed, in Section 301 and other Taft-Hartley amendments there is implicit the recognition that rights under Section 7 of the Act and those arising under collective bargaining agreements directly bear each on the other. See *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456-457; *Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 102-105. In the present case, to deny the Union parity of judicial participation in the determination whether the employer is bargaining with it in good faith on contract grievances, is in effect to determine *in absentia* both its "public" rights under federal law and its "private" rights under the collective contract. Certainly, such a result raises serious due process questions.[3]

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[3] In the present case there is the most direct relationship between the unfair labor practice issue under review in the court below and the Union's contractual rights. As the court below stated, the issue under review involves the union's opportunity *"to perform independent time studies*

6. *Orderly Administration of Justice.* A final important predicate for this Court's review inheres in the need for orderly administration of justice in the federal courts. See *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 260. All apart from the Union's claim of a right to intervention, it is clear that the Court of Appeals has the *power* to permit intervention to effectuate orderly adjudication. See *United States* v. *Lousiana*, 354 U.S. 515; *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514, 524-25, cert. denied 335 U.S. 912. When a Court of Appeals which denies intervention to the charging party reverses the Board's grant of relief, the subsequent Board order, which dismisses part or all of the complaint pursuant to the court's mandate, then seems clearly subject to appeal under Section 10(f) of the Act by the charging party as an "aggrieved person". Of course, if the charging party intervenes in the first judicial review proceeding, *res adjudicata* applies on its petition to review the Board's subsequent order pursuant to the mandate of the Court of Appeals. See *Siegel Co.* v. *NLRB*, —— F. 2d ——, 58 LRRM 2182; earlier decision, 324 F. 2d 228. But if denied intervention in the first judicial review proceeding, the charging party is entitled to *de novo* review on the merits whether it appeals to the original circuit court or to some different circuit. Such redundant and disorderly appellate review can be obviated by granting the charging party intervention in the original judicial review—a policy which can be effectuated by this Court's exercise of its supervisory authority to promote orderly administration of justice in the federal courts.

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on jobs involved in grievances under the parties' collective bargaining agreement . . ." To deny the Union participation as a party in the ultimate judicial determination of that question, is to effect the quantum of its substantive and procedural rights under the contract with the Company without its day in court. *Cf.*, n. 1, *infra*, p. 13.

Conclusion

It is respectfully submitted that the writ should be granted to resolve the other half of the question pending in No. 650.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

September Term, 1964

(Motion Argued November 30, 1964

Decided December 24, 1964)

Docket No. 29243

THE FAFNIR BEARING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Before: FRIENDLY and SMITH, *Circuit Judges,* and BLUMENFELD, *District Judge.**

Motion by union, which had filed charge leading to a determination of unfair labor practices on the part of an employer, for leave to intervene in employer's proceeding for review of the Board's order, in which the Board cross-petitioned for enforcement. Motion denied, with leave to file brief as *amicus curiae.*

FRIENDLY, *Circuit Judge:*

This is a proceeding by The Fafnir Bearing Company to review an order of the National Labor Relations Board, 146 N.L.R.B. No. 179 (1964), finding that Fafnir had violated §§ 8(a)(1) and (5) of the National Labor Relations Act by refusing to permit the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 133, to perform independent time studies on jobs involved in grievances under the parties' collective bargaining agreement; the Board has cross-petitioned for enforcement. The union, which had filed the pertinent charge, seeks leave to intervene. The

* Sitting by designation.

company and the Board oppose it, the Board suggesting that we grant the union leave to file a brief as *amicus curiae*. We deny the motion and grant such leave.

Although courts of appeals have permitted a charging person to intervene in a proceeding brought by the Labor Board for enforcement of an order stemming from the charge or a proceeding brought by the condemned party to review such an order, §§ 10(e) and (f), see, e.g., *West Texas Utils. Co.* v. *NLRB*, 184 F. 2d 233 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 939 (1951); *Kearney & Trecker Corp.* v. *NLRB*, 210 F. 2d 852 (7 Cir. 1954), *cert. denied*, 348 U.S. 824 (1954), all opinions of such courts discussing the issue that have been cited to us have ruled against intervention. See *Aluminum Ore Co.* v. *NLRB*, 131 F. 2d 485, 488 (7 Cir. 1942); *Stewart Die Casting Corp.* v. *NLRB*, 132 F. 2d 801 (7 Cir. 1942); *Haleston Drug Stores, Inc.* v. *NLRB*, 190 F. 2d 1022 (9 Cir. 1950), *cert. denied*, 342 U.S. 815 (1951); *NLRB* v. *Retail Clerks Int'l Ass'n*, 243 F. 2d 777, 783 (9 Cir. 1956); *Amalgamated Meat Cutters* v. *NLRB*, 267 F. 2d 169 (1 Cir.), *cert. denied sub nom. Geilich Tanning Co.* v. *Amalgamated Meat Cutters*, 361 U.S. 863 (1959). Since the issue has not been decided in this circuit, and the union contends that the decisions elsewhere contravene Supreme Court authority, we have thought it desirable to make an independent appraisal. After doing so, we join with other circuits in denying intervention, although the issue seems more debatable to us than it did to them.

Section 10(b) of the National Labor Relations Act defines the procedure for an unfair labor practice case. There must first be a charge of an unfair labor practice committed within the preceding six months; the Board or its agent may, but is not required to, issue a complaint. Only the person complained of is expressly given the right to a hearing. But "in the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony." As we read the Board's Rules and Regulations, § 102.8, 29 C.F.R. § 102.8 (1964), the charging person is recognized as a party to the administrative proceeding without the need for seeking intervention.

On the other hand the Act makes no provision as to intervention in proceedings for review or enforcement of

Board orders—a silence which contrasts with the provisions as to intervention included in the statutes relating to judicial review of orders of the Interstate Commerce Commission, 28 U.S.C. § 2323, and in the Hobbs Act, 5 U.S.C. § 1038, but which is paralleled by a similar silence as to the review of orders of other administrative agencies, see, e.g., 15 U.S.C. § 717r (Natural Gas Act), 16 U.S.C. § 8251 (Federal Power Act), 49 U.S.C. § 1486 (Federal Aviation Act), compare 49 U.S.C. § 1489. Rule 13 of this Court, our version of the uniform rule as to practice and procedure on review of agency action promulgated by the Judicial Conference as directed in the Hobbs Act, 5 U.S.C. § 1041, provides in paragraph (f) for a motion by "A person desiring to intervene in a case where the applicable statute does not provide for intervention" without saying what the standards governing intervention are. The fact that the union was accorded the status of an intervener before the Board does not automatically entitle it to the same role in a proceeding for judicial review. *Amalgamated Meat Cutters* v. *NLRB, supra,* 267 F. 2d at 170.

If we look to F. R. Civ. P. 24 by way of analogy, we ought consider subdivision (a)(2) granting intervention as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action," and subdivision (b)(2) for permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Although on a superficial view both provisions might seem applicable, analysis shows neither to be. Normally a charging person has no "claim" of any sort apart from that which the Board elects to bring on his behalf; certainly that is true of the union here.[1] However deeply he may

[1] A different case might—or might not—be presented when the charging person has a contractual claim which he submits initially to the Board because it may also involve an unfair labor practice. Cf. *Smith* v. *Evening News Ass'n,* 371 U.S. 195, 197-98 (1962). Our opinion is not addressed to such a case. And the right of a respondent who has been wholly or partially successful before the Board, to intervene on a petition by the charging party to reverse or modify the Board's order, presents a problem wholly different from that here considered. Such intervention seems to have been regularly allowed, and there would appear to be no doubt as to its propriety.

be concerned with the outcome of the Board's proceeding, *Amalgamated Util. Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940), holds that he does not have any legal "interest" since the purpose of the Labor Act is simply to enforce public rights—the Court analogizing the Act to the Federal Trade Commission Act and the rule of a charging party under the former to that of an informant under the latter.

The union's first counter to this—that if the Board had rejected the complaint in whole or even in part, the union could have petitioned for review under § 10(f) as "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought," *American Newspaper Publishers Ass'n* v. *NLRB*, 345 U.S. 100 (1953), is unpersuasive. As we have just pointed out in *Local 282, Int'l Bhd. of Teamsters* v. *NLRB*, —— F. 2d —— (2 Cir. 1964), the charging person is given standing to do this *ex necessitate* to prevent this portion of the statute from being rendered nugatory, and he is vindicating not a private but the public right. But the union then brings before us the ruling in *International Union of Mine Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338-39 (1945), that unions, permitted to intervene in the court of appeals to support a petition by the Board to vacate a decree for back-pay so as to substitute another method, had standing to seek Supreme Court review of an order denying the Board's petition from which the Board had not sought certiorari. See also *Donnelly Garment Co.* v. *NLRB*, 330 U.S. 219 (1947). The Court supported its somewhat cryptic statement that "in the circumstances disclosed, the petitioners, though they could not have instituted enforcement proceedings, had standing to seek review of the order denying the Board's petition," with two citations. One, *Williams* v. *Morgan*, 111 U.S. 684 (1884), held that bondholders and a committee representing purchasers at a foreclosure sale had standing to seek review of an order as to a mortgage trustee's compensation. The other was the first round of *Amalgamated Util. Workers, supra, Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 218 (1938), which recited the intervention of the alleged company unions as parties aggrieved by the order and of the charg-

ing union, seeking to organize the workers, in support of the order, without indicating whether these applications had been opposed.[2]

The Ninth Circuit, dealing with a problem somewhat different from that here presented, distinguished *Eagle-Picher* on the basis that the union there held to have standing to seek certiorari had already been allowed to intervene in the court of appeals. See *NLRB* v. *Retail Clerks Int'l Ass'n, supra,* 243 F. 2d at 783. It can be argued to the contrary that the Supreme Court would hardly have considered itself bound by an erroneous grant of intervention by a court of appeals. However, nothing indicates that anyone had resisted intervention in the court of appeals, in *Eagle-Picher Mining & Smelting Co.* v. *NLRB,* 141 F. 2d 843 (8 Cir. 1944), and the propriety of such intervention was not even considered in the briefs submitted to the Supreme Court, where the NLRB argued the merits precisely as if it had taken the appeal itself. In this context, we cannot regard the Supreme Court's comment as resolving by implication the problem of contested intervention by a charging party in the courts of appeals.

The union suggests that intervention should be allowed in order to permit it to seek Supreme Court review of an adverse decision against the Board's opposition or to block a settlement to which the Board and the respondent might agree. If in fact intervention would permit this—a point which we do not decide—these considerations would weigh against the grant rather than for it. We have just held in *Local 282* that the Board may settle over the wishes of the charging party prior to a hearing; no reason appears why the General Counsel could not abandon a case altogether at that stage if this seemed wise. The reasoning that sustains this power applies with almost the same force to the Board after it has passed on the merits of a complaint. While the energy already spent and the disharmony promoted are beyond recall, the public interest as viewed by

[2] Examination of the records indicates that the company union had petitioned for review and that its petition was consolidated with the company's; and that the motion of the charging union to intervene was unopposed and was granted by a single judge.

the Board may yet dictate that the conflict proceed no further; and *Amalgamated Util. Workers,* which was itself concerned with post-decision rights of the charging party, makes the public interest controlling.

It is true that settlement or abandonment after a Board decision on the merits may leave a precedent on the books which is insulated from review. But the holding is discounted for that very reason, and the problem will likely arise again in some other case where a different balance of factors does not suggest compromise. There is no real analogy with the charging party's conceded right of review after an unfavorable Board decision, where, for example, an erroneous belief of lack of power by the Board might otherwise be perpetuated in case after case. The union also notes that, absent intervention, a charging party's ability to compel an application for certiorari from an adverse decision by us may turn on whether the Board's original decision upheld the party respondent or the charging party. We fear that such minor anomalies cannot be wholly ironed out of the legislative scheme,[3] and we here face no extraordinary abuse of administrative discretion testing the limits of judicial power to respond. Cf. *Hourihan* v. *NLRB,* 201 F. 2d 187, 188 & n.4 (D.C. Cir. 1952), *cert. denied,* 345 U.S. 930 (1953). The controlling principle must be that the Board's exclusive powers, granted by Congress in the public interest and more than once recognized by the Supreme Court, should not be impaired by a general practice of granting intervention to charging parties in the courts of appeals.

Motion to intervene denied, with leave to file brief as *amicus curiae.*

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[3] Asymmetry would also result if we allowed intervention to facilitate a charging party's applying for certiorari; any advantage would then turn on whether review or enforcement proceedings happened to be initiated, creating the opportunity to intervene, before the Board called a halt.